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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/802,314	03/17/2004	Van Le Huynh	ECV-5539CON	3894

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EDWARDS LIFESCIENCES LLC
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EXAMINER

PELLEGRINO, BRIAN E

ART UNIT	PAPER NUMBER
3738	

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.



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In re Application of:
HUYNH, VAN LE et al
Serial No.: 10/802,314
Filed: March 17, 2004
Docket: ECV-5539CON
Title: LOW-PROFILE, PIVOTABLE HEART
VALVE SEWING RING

DECISION ON PETITION

This is a decision on the renewed petition filed on February 22, 2010 by which petitioner requests to a) overrule the holding of non-compliance dated November 23, 2009, which included a holding of abandonment and dismissal of Appeal, and b) accept the attached fourth supplemental appeal brief correcting the deficiencies noted. This petition is considered to accept the appeal brief filed on February 22, 2010 pursuant to 37 CFR § 1.181, and no fee is required.

The petition is **GRANTED IN PART**.

The relevant records lead to the dismissal of the last petition filed on December 21, 2009 have been clearly stated in the background of the decision mailed on January 19, 2010 and will not be repeated again.

Discussion and Analysis

In the renewed petition of February 22, 2010, petitioner argues in essence that the previous filed second and third supplemental Briefs of August 21, 2009 and December 21, 2009 were fully responsive to the notifications of non-complaint appeal brief. Petitioner faulted the examiner for not earlier recognizing the brief was non-compliant and requesting additional changes such that the second and the third supplemental briefs there were filed would not be non-compliant if the applicant presented a proper brief. Petitioner further argues that the examiner has approved of the Claim Summary section in his examiner's answer of January 6, 2009. Petitioner objects to the unfairness of suddenly holding the application abandoned when a bona fide attempt was made to correct the deficiencies in the notifications of non-complaint appeal brief. Petitioner also objects to the examiner making that decision seemingly contrary to his earlier finding that the Appeal Brief was compliant. Finally, petitioner objects there was lack of opportunity to respond to those additional noted deficiencies in the second and third supplemental appeal briefs.

A review of entire relevant file history shows the examiner accepted the corrected appeal brief of October 24, 2008 without further objection. An examiner's answer was written on January 6, 2009. However, on July 13, 2009, the Board of Patent Appeals and Interferences (BPAI) found the appeal brief of September 22, 2008 was defective. In particular, BPAI found that

independent claims 1 and 11 are not in compliance with 37 CFR § 41.37(c) (v). On page 2 of the appellant's notification letter mailed by BPAI clearly stated the specific requirement of 37 CFR § 41.37(c) (v) so that the appellant may make necessary corrections. On July 20, 2009, the Patent Appeals Center also mailed a Notification of Non-Compliant Appeal Brief to the appellant requesting a corrected appeal brief. Paragraph 10 of the Notification of July 20, 2009 also explains the reasons why the appeal brief was defective. The notifications sent by the BPAI and the Patent Appeals Center were very clear as to what the deficiencies were. There is no ambiguity found in the notifications. In response, the appellant filed the second and third supplemental appeal briefs on Augusts 21, 2009 and December 21, 2009, respectively. Unfortunately, the second and third supplemental appeal briefs remain defective as explained in the previous decision mailed on January 19, 2010. It can not be said that there was lack of opportunity to respond and correct the noted deficiencies in the second and third supplemental appeal briefs. The BPAI has already explained why the appeal brief of September 22, 2008 was deficient. Under the circumstances, the holding of non-complaint appeal brief notification mailed on November 23, 2009 was proper and will not be withdrawn.

In the renewed petition, petitioner also argues that the appeal brief as filed on February 22, 2010 does comply with 37 CFR § 41.37. A review of the latest appeal brief accompanying the current renewed petition filed on February 22, 2010 indicates that the defects noted by the BPAI have been remedied. In particular, the fourth supplemental appeal brief does refer the subject matter defined in the claims to the specification by page and line number, and to the drawing, if any, by reference characters as required by 37 CFR 41.37(c)(1)(vii). The latest fourth supplemental appeal brief of February 22, 2010 has corrected the deficiencies noted by the BPAI. The latest fourth supplemental appeal brief is now in compliance with MPEP § 1205.02 and therefore is acceptable. The request to accept the fourth supplemental appeal brief filed on February 22, 2010 is granted.

In the renewed petition, petitioner requests that the dismissal of appeal and abandonment of the application mailed on November 23, 2009 be withdrawn. However, the holding of abandonment of the application was found proper in accordance with MPEP 1215.04 as clearly explained in the previous decision mailed on January 19, 2010. The request to withdraw the abandonment will not be granted under 37 CFR 1.181.

Conclusion

The latest appeal brief of February 22, 2010 is found in compliance with 37 CFR § 41.37(c) (v). The request to accept the fourth supplemental appeal brief of February 22, 2010 is granted. The request to withdraw abandonment is denied for failure to timely submit a corrected appeal brief as required by the BPAI the Patent Appeals Center. The application remains in abandoned status in accordance with MPEP § 1215.04.

In order to re-instate the appeal, petitioner must file a separate petition to revive the application with the Petitions Office. No extension of time under 37 CFR 1.136(a) is permitted. A petition to revive under 37 CFR § 1.137, including the required fee should be separately filed and directed to the Office of the Deputy Commissioner for Patent Examination Policy at Mail Stop Petition,

Commissioner for Patents, P.O. Box 1450, Alexandria, Virginia 22313-1450. See MPEP 1002.02.

The petition to accept the appeal brief of February 22, 2010 is granted.
The petition to withdraw the holding of abandonment is denied.

Any inquiry regarding this decision should be directed to Henry Yuen, Special Programs Examiner, at (571) 272-4856.



Donald T. Hajec, Director
Technology Center 3700